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Koperal Zainal bin Mohd Ali & Ors v Selvi a/p Narayan (administrator of the estate and dependant of Chandran a/l Perumal, deceased) & Anor

B

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-01(NCVC)(W)-36–01 OF 2017
TENGKU MAIMUN, ZALEHA YUSOF AND SURAYA OTHMAN JJCA
23 APRIL 2018

C

Damages (Personal Injury or Death) — Appeal — Appeal against award made — High Court granted next-of-kin of detainee who died in police lock-up RM200,000 as exemplary damages after finding appellants negligent (by omission) in causing his death — Whether sum awarded fair and reasonable in the circumstances — Whether High Court had not acted upon a wrong principle of law in making the award

D

The appellants appealed against an award of RM200,000 which the High Court had granted the respondents as exemplary damages after finding the appellants liable for negligently causing a man's death while he was in police custody. The man ('the deceased') died four days after he was arrested on suspicion of being involved in a kidnapping case and detained in a police lock-up. A post-mortem revealed that he had died of hypertensive heart disease. There were injuries on his body and his stomach showed he had not taken any food or medication. At the inquest into the death, the coroner ruled that the death was due to negligence, omission and dereliction of duties on the part of the police. In a suit brought by the respondents, who were respectively the wife and daughter of the deceased and the administrators of his estate, the High Court held after a full trial that the respondents had proven their claims in negligence (by omission) and public misfeasance against the appellants and, apart from various other damages, awarded them RM200,000 as exemplary damages after taking into account recent decided cases on the point. At the hearing of the instant appeal, the appellants, without relying on any reason or authority for their submission, argued that the sum awarded was excessive and that a sum of RM50,000 would have been a more reasonable figure.

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Held, dismissing the appeal:

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(1) The High Court judge had properly taken into account the principles governing the assessment of quantum including the conduct of the parties. The judge had considered the decision in *Datuk Seri Khalid bin Abu Bakar & Ors v N Indra a/p P Nallathamby (the administrator of the estate and dependent of Kugan a/l Ananthan, deceased) and another appeal* [2015] 1 MLJ 353, where RM300,000 was awarded as exemplary

damages, and correctly found that while in that case action was taken against the police officers who had caused the death, no such action was taken in the instant case and that, accordingly, RM200,000 was a fair and reasonable figure in the circumstances. As the object of exemplary damages was to punish and deter, the quantum that was awarded was commensurate with the actions or omissions of the appellants. The High Court judge had not acted upon a wrong principle of law; nor was the amount awarded excessive. There was no reason to disturb the quantum that was awarded (see paras 9–11 & 13).

[Bahasa Malaysia summary

Perayu-perayu merayu terhadap award sebanyak RM200,000 yang diberikan oleh Mahkamah Tinggi kepada responden-responden sebagai ganti rugi teladan selepas mendapati perayu-perayu bertanggungjawab kerana secara cuai menyebabkan kematian seorang lelaki semasa dia berada di bawah jagaan polis. Lelaki tersebut ('si mati') meninggal dunia empat hari selepas dia ditangkap kerana disyaki terlibat dalam kes penculikan dan ditahan di dalam lokap polis. Bedah siasat menunjukkan bahawa dia meninggal dunia akibat sakit jantung hipertensi. Terdapat luka di tubuhn dan perutnya menunjukkan yang dia tidak mengambil apa-apa makanan atau ubat. Semasa inkues menyiasat kematian tersebut, koroner memutuskan bahawa kematian adalah akibat kecuaian, peninggalan dan keabaian tugas oleh pihak polis. Dalam tindakan yang dibawa oleh responden-responden, masing-masing adalah isteri dan anak perempuan si mati dan pentadbir-pentadbir estetnya, Mahkamah Tinggi memutuskan selepas perbicaraan penuh bahawa responden-responden telah membuktikan tuntutan mereka atas kecuaian (dengan peninggalan) dan misfeasans awam terhadap perayu-perayu dan, selain daripada pelbagai ganti rugi yang lain, mengawardkan mereka sebanyak RM200,000 sebagai ganti rugi teladan selepas mengambil kira kes-kes yang diputuskan akhir-akhir ini atas poin tersebut. Semasa pendengaran rayuan ini, perayu-perayu, tanpa bergantung ke atas apa-apa alasan atau kuasa untuk penghujahan mereka, berhujah bahawa jumlah yang diawardkan adalah berlebihan dan bahawa jumlah sebanyak RM50,000 adalah jumlah yang lebih munasabah.

Diputuskan, menolak rayuan:

(1) Hakim Mahkamah Tinggi telah mengambil kira dengan betul prinsip-prinsip yang mengawal penilaian kuantum termasuk tingkah laku pihak-pihak. Hakim telah mempertimbangkan keputusan dalam kes *Datuk Seri Khalid bin Abu Bakar & Ors v N Indra a/p P Nallathamby (the administrator of the estate and dependent of Kugan a/l Ananthan, deceased) and another appeal* [2015] 1 MLJ 353, di mana sebanyak RM300,000 diawardkan sebagai ganti rugi teladan, dan secara betul mendapati bahawa dalam kes tersebut tindakan kes diambil terhadap pegawai-pegawai polis yang telah menyebabkan kematian, tetapi tiada

A tindakan sedemikian diambil dalam kes ini dan oleh itu, RM200,000 adalah jumlah yang adil dan munasabah dalam keadaan. Memandangkan objek ganti rugi teladan adalah untuk menghukum dan menghalang, kuantum yang diawardkan adalah sepadan dengan tindakan-tindakan atau peninggalan-peninggalan perayu-perayu. Hakim Mahkamah Tinggi tidak bertindak atas prinsip undang-undang yang salah; atau pun mengawardkan jumlah yang berlebihan. Tidak ada alasan untuk mengganggu kuantum yang diawardkan (lihat perenggan 9–11 & 13).]

Notes

For cases on appeal against award made, see 6(1) *Mallal's Digest* (5th Ed, 2015) paras 463–468.

Cases referred to

Datuk Seri Khalid bin Abu Bakar & Ors v N Indra a/p P Nallathamby (the administrator of the estate and dependent of Kugan a/l Ananthan, deceased) and another appeal [2015] 1 MLJ 353; [2014] 9 CLJ 15, CA (refd)

Rookes v Barnard and others [1964] AC 1129, HL (refd)

Zulkiply bin Taib & Anor v Prabakar a/l Bala Krishna & Ors and other appeals [2015] 2 MLJ 607, CA (refd)

Appeal from: Civil Suit No 21NCVC-56–09 of 2015 (High Court, Kuala Lumpur)

Ruzaimah bt Mohd Redzuan (Senior Federal Counsel, Attorney General's Chambers) for the appellants.

M Visvanathan (Saibullah MV Nathan & Co) for the respondents.

Zaleha Yusof JCA:

[1] This is an appeal against the decision of the High Court at Kuala Lumpur which had on 9 January 2017 allowed the plaintiffs' claim for special damages, bereavement, loss of dependency, general and aggravated/exemplary damages, against the defendants for the death of one Chandran a/l Perumal ('the deceased') whilst in the custody of the police at its lock-up in IPD Dang Wangi.

[2] The first and second plaintiffs are the wife and eldest daughter of the deceased respectively. They are the lawful administrators of the estate of the deceased.

[3] The deceased was arrested on 6 September 2012 and detained by the police on suspicion of being involved in the kidnapping of a newborn baby. He was found dead in his cell on 10 September 2012. A post mortem revealed that

the cause of death was hypertensive heart disease. The report of the post mortem also revealed that his stomach was empty, meaning that he had not eaten any food and taken any medication. There were also signs of injuries on the deceased's body.

[4] In the inquest that was conducted into the deceased's death, the coroner had concluded that the deceased had needlessly died and that the death of the deceased was due to the negligence, omission and dereliction of duties on the part of the police. In fact the learned DPP who assisted in the inquest, in her submission at the end of the inquest had also concluded that the death of the deceased could have been avoided if not for the negligence of the police.

[5] The learned High Court judge in this instant case, after full trial, had found the defendants liable for negligence and public misfeasance. The following is His Lordship's finding:

> 148. In the result, on liability I am satisfied that the plaintiffs have succeeded in proving on a balance of probabilities that the defendants had breached their duty of care which was owed to the deceased and that the death of the deceased was due to their negligence in failing to send the deceased to the hospital for treatment in circumstances where it was apparent that the deceased was not behaving normally and where the police were already informed either directly or indirectly that the deceased was unwell and required medical attention. As such, I am of the view that liability for negligence (by omission) and public misfeasance has been established against the defendants.

[6] His Lordship had allowed all the reliefs sought by the plaintiffs. Following the decision, the appellants filed this appeal. However we found the appeal was not against liability or the entitlement of any reliefs awarded by the learned High Court judge. The instant appeal was actually confined to only the quantum of exemplary damages awarded and this was confirmed by the learned senior federal counsel Puan Ruzaimah bt Mohd Redzuan (SFC) when we asked her during her oral submission in the open court. However, for clarity, we reproduce the notice of appeal as follows:

> AMBIL PERHATIAN bahawa Koperal Zainal bin Mohd Ali, Koperal Pilot Lanye, Ins Mahezal b Md Noh, Ins Mohd Saidon bin Shaari, SAC Mohan Singh a/l Tara Singh, Ketua Polis Negara (Tan Sri Ismail Omar pada masa material) dan Kerajaan Malaysia, Perayu-Perayu/Defendan-Defendan yang dinamakan di atas yang tidak berpuas hati dengan keputusan Yang Arif Hakim S Nantha Balan, yang diberikan di Mahkamah Tinggi Malaya Kuala Lumpur pada 9 Januari 2017 yang membenarkan writ saman dan pernyataan tuntutan Plaintif-plaintif bertarikh 8.9.2015 dengan kos sebanyak RM50,000.00 *dengan ini merayu kepada Mahkamah Rayuan terhadap isu kuantum sahaja iaitu terhadap ganti rugi teladan sebanyak RM200,000.00*. (Emphasis added.)

[7] Hence the issue before us was not whether the plaintiffs were entitled to be awarded exemplary damages but whether the sum of RM200,000 as awarded by the learned High Court judge was a reasonable sum and not excessive.

[8] With due respect to the learned SFC, her submission before us, be it written or oral, was geared towards the principles in awarding exemplary damages, which was not the issue in this appeal. The learned SFC cannot be allowed to raise the entitlement of the said awards as this was not the subject matter of the notice of appeal. When asked what was wrong with the quantum awarded by the learned High Court judge, the learned SFC merely said the amount was excessive and RM50,000 would be more reasonable, without giving any reason or any authority.

[9] On the other hand, the learned High Court judge had referred to this court's decision in *Datuk Seri Khalid bin Abu Bakar & Ors v N Indra a/p P Nallathamby (the administrator of the estate and dependent of Kugan a/l Ananthan, deceased) and another appeal* [2015] 1 MLJ 353; [2014] 9 CLJ 15. The learned High Court judge had put it in the following manner:

> 164. In *Datuk Seri Khalid Abu Bakar & Ors v N Indra Nallathamby & Another* [2015] 1 MLJ 353; [2014] 9 CLJ 15 (CA) a sum of RM300,000 was awarded as exemplary damages. In that case, the deceased was beaten to death by the police officers. It would be wrong to draw direct parallels with that case because here it has not been proven that the injuries on the deceased were inflicted by the police.

[10] His Lordship further stated at para 76:

> 176. ... The question now is whether the quantum should be at par with what was awarded in the case of *Datuk Seri Khalid Abu Bakar & Ors v N Indra Nallathamby & Another* [2015] 1 MLJ 353; [2014] 9 CLJ 15 (CA). In that case, a sum of RM300,000 was awarded. In so far as this case is concerned, it was established during the trial that no action was taken against any police officers arising out of the death of the deceased. In all the circumstances, I am of the view that a sum of RM200,000 would be fair and reasonable as exemplary damages.

[11] The learned High Court judge had taken into account the fact that in *Datuk Seri Khalid*, action was taken against the police officers who caused the death while none was shown in this instance. We opined that His Lordship was correct in doing so. The matters to be considered in calculating awards of exemplary damages had been explained by this court in *Zulkiply bin Taib & Anor v Prabakar a/l Bala Krishna & Ors and other appeals* [2015] 2 MLJ 607. At p 629 of the report it was stated:

> Among the matters that the court might properly consider in deciding on the quantum of an award of exemplary damages are discussed in *McGregor on Damages*,

(16th Ed), 1997, at p 306 *et seq*. They include the followings: (a) such awards are to be moderate; (b) the conduct of the parties may properly be taken into account; (c) the quantum of a compensatory award may influence the quantum of an exemplary award; (d) the relevance of any criminal penalty (on the basis that 'punishing twice for the same misconduct offends against the basic principles of justice ...' p 310, para 467.

[12] At para 90 of the same case, this court had further stated:

We were reminded of the principle that in order to justify reversing the trial judge's decision on the question of the amount of damages, it will generally be necessary that the court should be convinced either the judge acted upon wrong principle of law, or that the amount awarded was so extremely high or so very small to make it an entirely erroneous estimate of the damages to which the plaintiff was entitled. In other words, it must be plain that no reasonable judge properly applying the relevant principles could have awarded so large a sum.

[13] We further opined the learned High Court judge had properly taken into account the principles governing the assessment of quantum which include the conduct of the parties as stated in *Zulkiply*. Bearing in mind the object of exemplary damages is to punish and deter (see *Rookes v Barnard and others* [1964] AC 1129), we found the quantum awarded by the learned High Court judge was indeed commensurate with the action or omissions of the defendants. We were not convinced that the learned High Court judge had either acted upon wrong principle of law or that the amount awarded was so excessive. We therefore found no reason to disturb the quantum awarded by the learned High Court judge.

CONCLUSION

[14] For those reasons, we dismissed the appeal with costs of RM10,000.

Appeal dismissed.

Reported by Ashok Kumar